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No. 01-961

Supreme Court, U.S.
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In The Supreme Court of the United States

ELECTRIC MOTOR & SUPPLY, INCORPORATED, RALPH FORCE and CHARLES M. RHODES,

Petitioners,

v.

POTOMAC ELECTRIC POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief in Opposition

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CORPORATE DISCLOSURE

Respondent Potomac Electric Power Company ("PEPCO") is a publicly held corporation which does not have any parent corporations. There is no publicly held company that owns ten percent (10%) or more of the company's stock.

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STATEMENT OF THE CASE

On July 29, 1998, PEPCO filed suit under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1962(a) and (d), alleging that Petitioners had engaged in fraudulent activities in the repair of PEPCO electric motors over a multi-year period. (Petitioner's Appendix ("PA") 35-87). Count II of PEPCO's Complaint alleging violation of 18 U.S.C. §1962(d) was dismissed by the District Court, but the Court denied the Motion to Dismiss as to PEPCO's remaining claim under 18 U.S.C §1962(a), and extensive discovery was thereafter conducted by all parties. (PA 16-17).

On or about September 14, 2000, Petitioners jointly filed their first motion for summary judgment, entitled Motion for Summary Judgment for Lack of Proof of Fraud ("First Summary Judgment Motion"). On or about September 15, 2000, Petitioners then filed a second joint motion for summary judgment based upon an alleged lack of proof of injury by PEPCO ("Second Summary Judgment Motion"). On November 8, 2000, the District Court granted summary judgment in favor of Petitioners based upon their Second Summary Judgment Motion, and did not reach the fraud issues contained in the First Summary Judgment Motion. (PA 18-32).

PEPCO appealed to the Fourth Circuit on December 4, 2000, and Petitioners shortly thereafter cross-appealed based upon the District Court's denial of their motion to dismiss the 18 U.S.C. §1962(a) claim and the failure of the Court to rule upon their First Summary Judgment Motion. On August 10, 2001, the Fourth Circuit affirmed in part and reversed in part the

District Court's ruling on the Second Summary Judgment Motion and remanded the case for further proceedings regarding proof of fraud and the related statute of limitations issues. (PA 1-15).

Petitioners thereafter sought *en banc* review of the Fourth Circuit's decision in Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990), based upon the District Court's denial of their Motion to Dismiss. The Fourth Circuit, however, declined to grant such review. (PA 33-34). Petitioners then moved the Fourth Circuit for a stay of its mandate pending their proposed petition for certiorari. On November 2, 2001, the Fourth Circuit denied Petitioners' motion, reasoning "that the Supreme Court's decision in Cedric Kushner Promotions, Ltd. v. Don King, 121 S. Ct. 2087 (2001) has made the decision in Bushby [sic] v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990) rule non-determinative of the outcome in cases of this sort." (Respondent's Appendix ("RA") 27).

Following entry of this Order, the District Court on November 6, 2001, in accordance with its earlier Order following remand by the Fourth Circuit, denied Petitioners' First Summary Judgment Motion and scheduled the matter for a pre-trial conference hearing on December 20, 2001. (RA 22). A pre-trial order was then entered by the District Court on December 20, 2001, and trial has been scheduled to commence on May 28, 2002. (RA 2).

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI MUST BE DENIED AS NO FINAL ORDER EXISTS TO SUPPORT THE APPEAL

Petitioners claim to seek review of the Fourth Circuit's August 10, 2001 Order affirming in part and reversing in part the District Court's ruling on the Second Summary Judgment Motion, pursuant to 28 U.S.C. §1254 (1). In fact, however, Petitioners seek review of the Fourth Circuit's decision in Busby v. Crown Supply, Inc., review which the three-judge panel Circuit on August 10, 2001, specifically noted could only be conducted *en banc*. (PA 6). Petitioners thus actually seek review by this Court of the Fourth Circuit's October 22, 2001 denial of Petitioner's *en banc* petition, not the Fourth Circuit's August 10, 2001 Order . (PA 33).

Under 28 U.S.C. §1291, the United States Courts of Appeals have jurisdiction over the final orders of the District Courts. As this Court has noted, "we have repeatedly interpreted Section 1291 to mean that an appeal ordinarily will not lie until final judgment has been entered in a case." Cunningham v. Hamilton County, 527 U.S. 198, 203, 119 S. Ct. 1915, 1919, 144 L.Ed. 2d 184 (1999) (citing Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712, 116 S. Ct. 1712, 135 L.Ed. 2d 1 (1996); Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867, 114 S. Ct. 1992, 128 L.Ed. 2d 842 (1994); and Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430, 105 S. Ct. 2757, 86 L.Ed. 2d 340 (1985)). A final order is one that "ends the litigation on the merits and leaves nothing for the court to do but to execute the

judgment." Cunningham, 527 U.S. at 204, 119 S. Ct. at 1920 (citations and quotation omitted). The rule of finality and its limits upon the appeal of interlocutory rulings serves several important purposes:

> It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which litigation may give rise, from its initiation to entry of judgment. The rule also serves the important purpose of promoting efficient judicial administration.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374, 101 S. Ct. 669, 673, 66 L.Ed. 2d 571, 578 (1981) (citations and quotation omitted).

Based upon the foregoing precedent, Petitioners request for a writ of certiorari must be denied because no final order exists to support Petitioner's appeal. The Fourth Circuit, on August 10, 2001, overturned the District Court's grant of summary judgment and remanded the case for trial. (PA 1). As a result, no final judgment exists upon which Petitioners might

legitimately base their request for certiorari. To the contrary, in its present procedural posture, Petitioners are actually attempting to appeal the District Court's denial of their motion to dismiss. Such procedural posture renders the petition inappropriate. See Van Cauwenberghe v. Biard, 486 U.S. 517, 527, 108 S. Ct. 1945, 1952, 100 L.Ed. 2d 517 (1988) (finding that the Court of Appeals was correct to conclude that the District Court's denial of petitioners' motion to dismiss was not immediately appealable). See also Smith v. Regan, 841 F.2d 28, 30 (2nd Cir. 1988) (citing, 28 U.S.C. §1291) ("[g]enerally, orders denying motion to dismiss for lack of jurisdiction or for failure to state a claim are not appealable for lack of finality"); Prince v. Hicks, 198 F.3d 607, 609 (6th Cir. 1999) ("[w]e generally lack jurisdiction over a district court's decision not to dismiss a suit for failure to state a claim"); Roberson v. Mullins, 29 F.3d 132, 136 (4th Cir. 1994) ("[t]he district court's ruling denying this motion to dismiss is obviously not a final decision that concludes the litigation").

In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), this Court carved out a narrow exception to the final order rule, designated as the collateral order doctrine, pursuant to which a small class of interlocutory orders may be reviewed despite their lack of finality. Under this doctrine, an order may be subject to immediate appeal if it: (1) conclusively determines a disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal. See Johnson v. Jones, 515 U.S. 304, 310, 115 S. Ct. 2152, 2155, 132 L.Ed. 2d 238, 244 (1995).

The present Petition for Writ of Certiorari, however, is clearly not appropriate under the limited collateral order doctrine enunciated in Cohen. First and foremost, the issue of the continued viability of Busby is in no manner effectively unreviewable on appeal. To the contrary, trial in this matter is already scheduled for May of 2002, and Petitioners can easily raise the issue of the injury investment rule on appeal following trial. The issue is thus in no manner effectively unreviewable on appeal. See Van Cauwenberghe, 486 U.S. at 527, 108 S. Ct. at 1952 (noting that the denial of a motion to dismiss for lack of jurisdiction is not an immediately appealable collateral order because the issue "may be effectively vindicated following final judgment").

Second, the issue raised by Petitioners is not completely separate from the merits of the action itself. To the contrary, the question of investment of racketeering proceeds is inextricably tied to factual determinations concerning the occurrence and nature of the fraudulent activities at issue, determinations which can only be properly made by the finder-of-fact at trial. See Van Cauwenberghe, 486 U.S. at 527, 108 S. Ct. at 1953 (noting that the question of the convenience of the forum raised by the denial of a motion to dismiss is not completely separate from the merits of the action, and is thus not a collateral order immediately appealable under Cohen). See also Roberson, 29 F.3d at 136 ("Denying a motion that seeks dismissal on the grounds that Roberson's claim cannot succeed on the merits . . . is not a collateral order reviewable under Cohen . . ."); Spiess v. C. Itoh & Co., 725 F.2d 970, 974 (5th Cir. 1984) (holding that, while the motion to dismiss raised interesting issues of international treaty

interpretation, the motion was not "one completely separate from the merits of the action" as required by the collateral order doctrine, and the denial of the motion was therefore not immediately appealable).

CONCLUSION

For the foregoing reasons, PEPCO respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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